No. 12766

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN URQUHART BIRNIE, an individual doing business as BIRNIE ELECTRIC COMPANY, and MASSACHUSETTS BONDING AND INSURANCE COMPANY, a corporation,

Appellants,

vs.

THE PERMANENTE METALS CORPORATION, a corporation, and UNITED STATES MARITIME COMMISSION,

Appellees.

Opening Brief on Behalf of Appellant John Urquhart Birnie, an Individual Doing Business as Birnie Electric Company.

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Jurisdiction.

The jurisdiction of this Court is invoked under Section 1291 of the Judicial Code (28 U. S. C. A., Sec. 1291). The original suit is an action where the matter in controversy exceeds the sum of $3,000.00, exclusive of interest and costs and is between citizens of different states, of which the District Court had jurisdiction under Section

1332 of the Judicial Code (28 U. S. C. A., Sec. 1332). The issues between these parties were framed by the first amended complaint of plaintiff, The Permanente Metals Corporation, against John Urquhart Birnie and Massachusetts Bonding and Insurance Company [R. 89]; the answer to first amended complaint of plaintiff filed by defendants John Urquhart Birnie and Massachusetts Bonding and Insurance Company, together with a cross-complaint and counterclaim against The Permanente Metals Corporation and United States Maritime Commission (including the individual members thereof) [R. 101], and the answer of The Permanente Metals Corporation to the aforesaid counterclaim and cross-complaint [R. 129], together with the answer of United States Maritime Commission to the aforesaid counterclaim and cross-complaint[1] [R. 141].

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[1]Throughout this brief the defendants below and appellants in this court, John Urquhart Birnie and Massachusetts Bonding and Insurance Company will be referred to respectively as "Birnie" and "Bonding Company," and plaintiff below and appellee in this court, The Permanente Metals Corporation, will be referred to as "Permanente." Wherever necessary to refer to United States Maritime Commission it will be referred to as "Maritime Commission" and wherever necessary to refer to the United States Navy, it will be referred to as "Navy." Reference to the transcript of record will be made by reference to said record by the letter "R," followed by the number of the page referred to. All emphasis will be ours unless otherwise noted.

Concise Abstract of Case and Questions Involved.

This case involves the construction of a group of vessels for use by the United States Navy during the last war known as "APA's," which letters were designated by the Navy to stand for "Auxiliary Transport Attack."[2] This type of vessel performed an important service for the combatant United States Navy in its conquest of the Pacific Ocean. As an adjunct of the combatant fleet, the United States Navy desired a type of vessel with special compartmentation, armament and facilities for stowage, handling and launching of various types of amphibious craft, whereby troops with their gear and suitable amphibious vehicles could be transported at a speed consistent with that necessary to be maintained by the fleet to the shores of the enemy from whence these troops could be placed ashore ready for combat [R. 264-295]. Twenty-two of these APA vessels furnish the subject matter of this litigation. The prime contractor was Permanente who contracted in writing with the Maritime Commission to build 77 vessels bearing Maritime Commission hulls Nos. 525 to 601 inclusive, of a design known as VC-S-AP2, pursuant to Public Laws 247 and 630 (77th Congress) [R. 595]. This particular design is conceded to represent a commercial cargo carrying type of vessel. This contract will hereinafter be called "Prime Contract."

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[2]In Navy parlance, "A" stands for "Auxiliary," "P" stands for "Transport," and "A" stands for "Attack." [R. 308.]

By Addendum No. 2 to prime contract, the Maritime Commission directed Permanente to complete 22 of these 77 vessels as *combat loaded troop ships* (Design VC2-S-AP5)[3] [R. 626]. Birnie was a sub-contractor for these 22 vessels and contracted with Permanente [R. 13, 39] to install Degaussing, radar, voice tube, mechanical telegraph and mechanical wireways in and upon these 22 vessels. This subcontract, for convenience, will hereinafter be called "VS-14."

While it is conceded that the 77 vessels originally to be built under the prime contract were intended to be of a commercial cargo carrying type (Maritime Commission design VC-2-AP2), and all 77 might have been built as such in the ordinary course of events, 22 of this group of 77 vessels covered by VS-14 [R. 13] and its Addendum No. 1 [R. 39] were changed in design to fit a special naval need and actually became naval vessels. The genesis of their intended naval character occurred on November 9, 1943, when Admiral William D. Leahy, as Chief of Staff, acting for the Joint Chiefs of Staff, directed the Maritime Commission to construct 130 APA's, of which the said 22 vessels covered by VS-14 formed a part [R. 737, 340].

Following Admiral Land's directive, these contractual changes occurred:

> (a) Said Addendum No. 2 to the Prime Contract dated December 7, 1944 [R. 626 to 628] was executed memorializing the conversion of the aforesaid 22 vessels from the cargo carrying type, as they were

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[3]In Maritime Commission parlance a ship of the design VS2-S-AP5 is commonly referred to as an "AP5." [R. 522.]

originally conceived, to the naval vessels they eventually became.

(b) Addendum No. 1 to said Contract VS-14 (Dated August 10, 1944) [R. 39] was executed likewise memorializing the conversion of the said 22 vessels to the naval vessels they eventually became.

Each party makes claim against the other as follows:

(a) Permanente claims it overpaid Birnie by $114,258.98 after all offsets, claiming this amount by reason of Special Provision No. 4 of VS-14, which purports to limit Birnie's profit to 10% of the stated contract price. This money, if recovered, becomes the property of the Maritime Commission. Permanente makes separate claim for the sum of $1545.66 which Birnie admits due and owing, but this claim has no bearing on the issues raised respecting Special Provision No. 4 of said subcontract VS-14.

(b) Birnie seeks to recover the stated contract price for his work. If successful he accounts for this money as an income tax to the Bureau of Internal Revenue but gains the privilege to apply against this tax such losses as he may have incurred during the appropriate taxable years. He claims Permanente owes him the sum of $43,185.27, insisting that the 10% profit limitation of Special Provision No. 4 of VS-14 is of no force or effect. This sum is conceded to be the stated contract price of VS-14, less what Birnie has received in payment on account thereof, less the aforesaid offset of $1545.66. Birnie has abandoned all other claim asserted in his cross-complaint [R. 223] arising from another subcontract known as VS-28, except to the extent that

> Permanente admits owing Birnie the sum of $34,-687.59 on account thereof, which amount was considered an offset item in the judgment [R. 222-223] in arriving at the above claim of $114,258.99, and is automatically added to his claim of $43,185.27 on VS-14 aforesaid, and therefore his claim, in the aggregate, is for $78,872.86.

Thus each party differs as regards Special Provision No. 4 of VS-14, and the basic question involved in this appeal is whether the District Court erred in giving effect to that portion of Special Provision No. 4 of VS-14, which purports to limit Birnie's profit to ten per cent of the total contract price of VS-14. This question is solved when it is determined whether VS-14 is a subcontract for the construction of naval vessels or portions thereof within the scope and meaning of the Vinson-Trammell Act and certain other statutes pertaining thereto.

Specification of Errors.

1. The Court erred in finding that the prime contract —insofar as the 22 vessels covered by VS-14 are concerned—was not a contract for the construction and manufacture of complete naval vessels or portions thereof, in that such finding is not supported by any competent evidence.

2. The Court erred in finding that the subcontract VS-14 was not a contract or subcontract for the construction and manufacture of complete naval vessels or portions thereof, in that such finding is not supported by any competent evidence.

3. The Court erred in finding that the prime contract —insofar as the 22 vessels covered by VS-14 are con-

cerned—was a contract made by the Commission acting as an independent agency of the United States and on its own behalf in that such finding is not supported by any competent evidence.

4. The Court erred in finding that Permanente has done and performed all acts and things required on its part to be done and performed under VS-14 and the addenda thereof, in that such finding is not supported by any competent evidence.

5. The Court erred in finding that said VS-14 was not a contract made with Birnie by the Secretary of the Navy in that it is immaterial to the issues of this case whether or not said VS-14 was a contract made between Birnie and the Secretary of the Navy.

6. The Court erred in concluding as a matter of law that Special Provision No. 4 contained in VS-14 is valid and binding and that said provision was not rendered invalid or void or without effect because of Section 401 of Title IV of the Second Revenue Act of 1940 (54 Stat. 1003, 34 U. S. C. A. 496(a)).

7. The Court erred in concluding as a matter of law that said Section 401 of Title IV of the Second Revenue Act of 1940 is inapplicable to the prime contract and to VS-14 and to Special Provision No. 4.

8. The Court erred in concluding as a matter of law that the Act of March 26, 1934 (48 Stat. 503, 34 U. S. C. A. 496), was not applicable to the prime contract and to VS-14 and to Special Provision No. 4.

9. The Court erred in concluding as a matter of law that the prime contract was not a contract for the construction or manufacture of any complete naval vessel or any portions thereof within the meaning and effect of the aforesaid acts.

10. The Court erred in concluding as a matter of law that VS-14 was not a contract or subcontract for the construction or manufacture of any complete naval vessel or any portions thereof within the meaning and effect of the aforesaid acts.

11. The Court erred in concluding as a matter of law that Permanente is not obligated to pay Birnie any amount under VS-14.

12. The Court erred in concluding as a matter of law that Birnie is obligated to pay to Permanente under VS-14 the sum of $148,946.57, or any amount.

13. The Court erred in concluding as a matter of law that Birnie is obligated to pay Permanente attorneys' fees of $15,000.00, or any amount, under Article 29 of VS-14.

14. The Court erred in concluding as a matter of law that Birnie, as the principal, is severally liable or jointly liable with the defendant, cross-complainant and appellant Massachusetts Bonding and Insurance Company, a corporation, under any performance bonds or endorsements thereto to pay to Permanente the sum of $114,258.98, or the sum of $15,000.00 for attorneys' fees, or any sums whatsoever.

15. The Court erred in concluding as a matter of law that Permanente should have judgment for its costs of suit against Birnie.

16. The Court erred in concluding as a matter of law that the Commission should have judgment for its costs of suit against Birnie.

17. The Court erred in not granting the relief as prayed for in the answer of Birnie to the first amended complaint, the cross-complaint and counterclaim of Birnie to the extent of $78,872.86, plus interest and costs of suit.

ARGUMENT.

The District Court erred in failing to hold that Section 401 of Title IV of the Revenue Act of 1940 (34 U. S. C. A. 496a) rendered Special Provision 4 of subcontract VS-14 "without effect."

I.

Special Provision 4 of Subcontract VS-14.

In the abstract of the case statements have been made that this Special Provision No. 4 "limited Birnie's profit to ten per cent of stated contract price." The language of that part of said Special Provision No. 4 is quoted as follows:

> "4. Report of Cost—Excess Profits: The Subcontractor agrees to account for and pay to the Contractor certain profits derived under this contract, and for such purposes agrees:
>
> (a) * * *
>
> (b) To pay to the Contractor profit as shall be determined by the Commission in excess of ten (10) per cent of the total contract price which amount shall become the sole property of the Commission." [R. 18-19.]

II.

The Effect of Section 401 of Title IV of the Second Revenue Act of 1940 (34 U. S. C. A. 496a) Is to Suspend the Profit Limiting Provisions of the Vinson-Trammell Act Relating to Construction of Naval Vessels or Portions Thereof.

Said Section 496a (of 34 U. S. C. A.) provides as follows:

> "The provisions of Section 496 of this title, beginning with the first proviso thereof, and section 1152(b) of Appendix to Title 50, shall not apply to contracts or subcontracts for the construction or manufacture of any complete naval vessel or any Army or Navy aircraft, or any portion thereof, which are entered into in any taxable year to which the excess profits tax provided in sub-chapter E of Chapter 2 of Title 26 is applicable or would be applicable if the contractor or subcontractor, as the case may be, were a corporation, *and any agreement to pay into the Treasury profit in excess of 10 per centum, 12 per centum, or 8 per centum, as the case may be, of the contract prices of any such contracts or subcontracts shall be without effect.* This section shall also apply to such contracts or subcontracts which were entered into before the date of the beginning of the contractor's or subcontractor's first taxable year which begins in 1940 and which are not completed before such date. Oct. 8, 1940, 11 p. m., E. S. T., c. 757, Title IV, Sec. 401, 54 Stat. 1003." (Italics added.)

Section 496a suspends the profit limiting provisions of Section 496 of Title 34, U. S. Code, which is Section 3 of the Vinson-Trammell Act (also commonly known and referred to as the Vinson Act).

Section 496a was originally enacted as Section 401 of Title IV of the Second Revenue Act of 1940. The title of Section 496a as the section appears in its original form at 54 Stat. 1003 is "Suspension of profit limiting provisions of the Vinson Act."

The profit limiting provisions of Section 496 which are suspended by Section 496a are as follows:

> "§496. Annual estimates; reports of contractors; limitation on profits.
>
> "* * * Provided, that no contract shall be made by the Secretary of the Navy for the construction and/or manufacture of any complete naval vessel or aircraft, or any portion thereof, herein, heretofore, or hereafter authorized unless the contractor agrees—
>
> "(a) To make a report, as hereinafter described, under oath, to the Secretary of the Navy upon the completion of the contract.
>
> "(b) To pay into the Treasury profit, as hereinafter provided shall be determined by the Treasury Department, in excess of 10 per centum of the total contract prices, for the construction and or manufacture of any complete naval vessel or portion thereof, and in excess of 12 per centum of the total contract prices for the construction and or manufacture of any complete aircraft or portion thereof of such contracts within the scope of this section as are completed by the particular contracting party within the income taxable year, such amount to become the property of the United States, * * * Provided, that if there is a net loss on all such contracts or subcontracts for the construction and or manufacture of any complete naval vessel or portion thereof completed by the particular contractor or subcontractor within any income taxable year, such net loss shall

be allowed as a credit in determining the excess profit, if any, for the next succeeding income taxable year, and that if there is a net loss, or a net profit less than 12 per centum, as aforesaid on all such contracts or subcontracts for the construction and or manufacture of any complete aircraft or portion thereof completed by the particular contractor or subcontractor within any income taxable year, such net loss or deficiency in profit shall be allowed as a credit in determining the excess profit, if any, during the next succeeding four income taxable years, and that the method of ascertaining the amount of excess profit, initially fixed upon shall be determined on or before June 30, 1939; Provided further, that if such amount is not voluntarily paid the Secretary of the Treasury shall collect the same under the usual methods employed under the Internal-Revenue laws to collect Federal income taxes: Provided further, that all provisions of law (including penalties) applicable with respect to the taxes imposed by Title I of the Revenue Act of 1934, and not inconsistent with this section, shall be applicable with respect to the assessment, collection, or payment of excess profits to the Treasury as provided by this section, and to refunds by the Treasury of overpayments of excess profits into the Treasury: And provided further, that this section shall not apply to contracts or subcontracts for scientific equipment used for communication, target detection, navigation, and fire control as may be so designated by the Secretary of the Navy: * * *"

Section 496 of Title 34 was enacted in 1934 as part of the Vinson-Trammell Act (Act of March 27, 1934; 48 Stat. 503, Secs. 494, 495, 496, 497 U. S. Code) dealing with the composition of the Navy.

III.

VS-14 Was Entered Into in a Year to Which the Excess Profits Tax Was Applicable.

The excess profits tax was made applicable to tax years commencing after December 31, 1939, by the Revenue Act of October 8, 1940 (54 Stat. 1003). It was repealed by the Act of November 8, 1945 (59 Stat. 568) which made the provisions of the excess profits tax inapplicable to any tax year commencing after December 31, 1945.

IV.

VS-14 Was a Subcontract for the Construction or Manufacture of a Portion of a Complete Vessel.

The work done by Birnie and the equipment installed are clearly a part of a complete vessel within the meaning of the Vinson-Trammell Act. The following case holds that a subcontract to supply the initial ammunition to be placed aboard a naval vessel was a subcontract for the construction of a complete naval vessel.

> "Petitioner manufactured, under written contract, shells, or torpedo heads, for new naval destroyers. Our question is whether such articles are 'for the construction * * * of any *complete* naval vessel * * * or any portion thereof.' If the articles are so considered, Section 3 of the Vinson Act requires the contractor to pay to the United States, all profit in excess of ten per cent of the total contract price. Petitioner argues that the torpedo heads are no part of a 'complete naval vessel' but are merely an independent instrumentality used in conjunction with a naval vessel. * * *

"Conceding that the question is not free from doubt our mature conclusion is that a 'complete naval vessel' includes the shell and torpedo heads made for said naval vessel and which were to be carried as part of its equipment."

Pressed Steel Tank Co. v. Commissioner of Internal Revenue (C. C. A. 7th), 133 F. 2d 776 (Affirming 46 B. T. A. 52).

The following case holds that a subcontract to supply aluminum in either finished or semi-finished state which would become a part of a naval vessel was a subcontract for the construction of a complete naval vessel.

"The profit-limiting provision of Sec. 3 of the Vinson Act, which was not a part of the bill (H. R. 6604) as originally introduced, was independently offered as an amendment on the floor of the House (Vol. 78 Cong. Record, Part 2, p. 1629) and, after some discussion, was accepted by Chairman Vinson of the Naval Affairs Committee who was in charge of the bill in the House (*ib.* p. 1630). The amendment was the expression of a widely entertained desire on the part of members of Congress, oft expressed in both Houses during the passage of the bill, that excessive profits, such as had been derived from naval construction in times past, should be prevented. While there was some opposition in Congress to the bill as a whole in its authorization of extensive naval construction, we fail to find where a single voice was raised against the profit-limiting provision. Nor were any fine sights drawn by way of discrimination as to whose profits should or should not be so limited. The aim of the provision was to limit the profits on business done in connection with the naval construction provided for by the Act. * * *

"The evident legislative purpose of the provision can be effectuated fully and uniformly only if the word 'subcontractor,' as used therein, is construed to embrace anyone who, by contract or order, furnishes specified materials for intended and designated use in identified naval construction authorized by the Act. We think that it was the intent of Congress that the terms 'subcontract' or 'subcontractor,' as used in the Vinson Act, should be so construed."

Commissioner of Internal Revenue v. Aluminum Co. of America (C. C. A. 3rd), 142 F. 2d 663 (cert. den. 323 U. S. 728, 89 L. Ed. 585).

V.

The Undisputed Evidence Showed These 22 Vessels Covered by VS-14 Were Naval Vessels Because of (a) The Events Leading Up to Their Actual Use by the Navy; (b) The Nature of Their Actual Use by the Navy; and (c) Their Physical Characteristics.

(A) Although derived from standard commercial hulls and propulsion machinery, they, and each of them, were converted structurally and specially equipped to the extent necessary for their intended naval use [R. 259-295, 304-333].

(B) These conversion features cost the Navy $34,-213,000.00, which sum the Navy paid the Commission from Navy funds [R. 341].

(C) They were delivered into the control, custody and sole right of possession of the Navy between the 16th day of August, 1944, and the 16th day of December, 1944 [R. 754, 338].

(D) After their delivery into the control, custody and sole right of possession of the Navy, they, and each of them, were officially commissioned as ships of the United States Navy [R. 338-339].

(E) They, and each of them, were given official naval letter classification "APA," which constitutes official naval abbreviations for the following words: "Auxiliary Transport Attack" respectively [R. 753, 305-312].

(F) They, and each of them, were given official naval names [R. 753, 305-312].

(G) They, and each of them, were given official naval number designators within the APA letter classification [R. 753, 305-312].

(H) They were actually used by the Navy as an adjunct of the combatant fleet [R. 259-295].

(I) With the exception of two of these 22 vessels, they all remained in the control, custody and sole right of possession of the United States Navy from the date of delivery of each to the United States Navy until on or about July 1, 1947 [R. 339].

(J) That with the exception of one of these vessels, legal title to each and all of them was transferred by the Commission to the Navy on or about January 14, 1946 [R. 340].

VI.

Quite Aside From the Events Leading Up to Their Actual Use by the Navy and Their Physical Characteristics, Undisputed Evidence Showed That These Vessels Were Constructed by the Commission for the Intended Ultimate Use of the Navy Pursuant to Letter Arrangement Between the Two Agencies and Because of This Intended Ultimate Use by the Navy, They Are Naval Vessels as a Matter of Law.

"But the petitioner contends that, even if that is true, the construction of vessels or other military equipment or supplies is in a different category. It argues that none of the articles shipped in the present case was military or naval, since they were not furnished to the armed forces for their use. They were supplied, so the argument runs, for manufacture and construction which are civilian pursuits and which were here in fact performed by civilian contractors. Only the completed product, not the component elements, was, in that view, for military or naval use.

"Military or naval property may move for civil use, as where Army or Navy surplus supplies are shipped for sale to the public. But in general the use to which the property is to be put is the controlling test of its military or naval character. Pencils as well as rifles may be military property. Indeed, the nature of modern war, its multifarious aspects, the requirements of the men and women who constitute the armed forces and their adjuncts, give military or naval property such a broad sweep as to include almost any type of property. More than articles actually used by military or naval personnel in combat are included. Military or naval use in-

cludes all property consumed by the armed forces or by their adjuncts, all property which they use to further their projects, all property which serves their many needs or wants in training or preparation for war, in combat, in maintaining them at home or abroad, in their occupation after victory is won. It is the relation of the shipment to the military or naval effort that is controlling under §321(a). The property in question may have to be reconditioned, repaired, processed or treated in some other way before it serves their needs. But that does not detract from its status as military or naval property. *Southern P. Co. v. Defense Supplies Corp.* (D. C. Cal.), 64 F. Supp. 605. Within the meaning of §321(a) an intermediate manufacturing phase cannot be said to have an essential 'civil' aspect, when the products or articles involved are destined to serve military or naval needs. It is the dominant purpose for which the manufacturing or processing activity is carried on that is controlling."

Northern Pacific Railway Company v. United States of America, 330 U. S. 248, 91 L. Ed. 876.

(a) *November 9, 1943.* Admiral William D. Leahy, USN, as Chief of Staff to the Commander in Chief of the Army and Navy, acting for the Joint Chiefs of Staff, in a letter to Rear Admiral E. S. Land, Chairman of the Commission, requested the Commission "to construct 130 standards APAs * * * to be completed as early in the fourth quarter of 1944 as practicable." He refers to these vessels as "military types" [R. 724].

The 22 vessels subsequently covered by VS-14 were derived from and a part of this original group of 130 standard APAs [R. 340, 737].

(b) *December 6, 1943.* Rear Admiral E. S. Land, Chairman of the Commission, in a letter to the Secretary of Navy, acknowledges receipt of the Admiral Leahy letter of November 9, 1943 (6(a) *supra*), and advises the Secretary of Navy where the requested vessels will be constructed and confirms certain decisions reached between them, the Commission and the Navy's Bureau of Ships, with regard to the program insofar as design, working plans, drawings and design plans are concerned. He asks for naval confirmation of these decisions [R. 726 to 729, incl.].

(c) *December 10, 1943.* The Navy's Bureau of Ships, in a letter to the Chairman of the Commission, acknowledges receipt of the Rear Admiral Land letter of December 6, 1943 (6(b) *supra*) and confirms its contents with certain exceptions therein noted [R. 730 to 732, incl.].

(d) *December 11, 1943.* Rear Admiral E. S. Land, Chairman of the Commission, in a letter to the Secretary of Navy, supplements his letter of December 6, 1943 (6(b) *supra*) by adding certain additional information concerning the program. Apparently this letter crossed the Navy's reply letter (6(c) *supra*) in the mails [R. 733 to 734, incl.].

(e) *February 29, 1944.* The Hon. Frank Knox, Secretary of Navy, in a letter to the Chairman of the Commission, confirms the program as set forth

in letters (6(b), (6(c) and 6(d) *supra*) and agrees to accept the vessels on a loan charter basis under conditions whereby (1) delivery to be made at builder's yards in accordance with plans and specifications and including successful tests; (2) control, custody and sole right of possession of each vessel to be in Navy for duration of emergency; (3) Navy to return the vessels after termination of emergency as conditions permit [R. 735 to 741, incl.].

In this letter, VS-14 vessels are specifically referred to on page 1 in Enc. A. by Commission hull number 552 to 573, inclusive, Navy No. 204 to 225, inclusive, Vessel type VC2-S-AP5 and place of construction, Permanente Metals Corporation Richmond No. 2, Richmond, California.

(f) *June 3, 1944.* Rear Admiral E. S. Land, for the Commission, by letter to Secretary of the Navy, refers to the letter of February 29, 1944, from the Secretary of the Navy (6(e) *supra*) and states that the Navy should reimburse the Commission for any and all expenses incurred in any manner in connection with the delivery and conversion features incorporated in the vessels at the request of the Navy. He asks for acknowledgment from the Secretary of the Navy for this additional condition to the transfer of these vessels [R. 742 to 744, incl.].

(g) *July 3, 1944.* The Hon. James Forrestal, Secretary of the Navy, in a letter to the Chairman

of the Commission, agreed to the additional condition of the naval reimbursement to the Commission as requested by Rear Admiral Land in his letter of June 3, 1944 (6(f) *supra*) and the matter of terms and conditions of the procurement of these vessels from the Commission by the Navy became complete [R. 744 to 745, incl.].

VII.

Regulation of So-called Excess Profits From the Construction of Naval Vessels During the Period of the Excess Profits Tax Was Required by the Unequivocal Terms of Section 401, to Be Carried Out Only Under the Provisions of the Internal Revenue Code.

The Vinson-Trammell Act established a method for controlling the profits to be made by contractors and subcontractors engaged in naval construction. This is clear from the profit limiting provision of the Act itself (34 U. S. C. A. 496a).

Pressed Steel Tank Company v. The Commissioner, 133 F. 2d 776;

Commissioner v. Aluminum Company of America, 142 F. 2d 663.

The system there devised carried along satisfactorily until the imminence of the entry of the United States into the late great war. At that time obviously the scope of military and naval construction vastly increased, and it is a matter of common knowledge that large segments of American business and industry became deeply engaged in military and naval construction. The limited scheme

for limitation of profits to be made on naval construction no longer satisfied the practical situation and in fact, it proved to be a positive hindrance to the naval construction program for the reason that it placed persons and corporations engaged in naval work at a positive disadvantage when compared with persons and corporations engaged in other aspects of the military and defense program.

In the fall of 1940 these facts had become obvious; likewise the need for a scheme of regulation of so-called excess profits which would extend to every phase of the military and naval construction programs had become apparent. The Revenue Act of 1940 was the scheme devised by Congress in the light of existing facts and seeming needs to supply a scheme for the control of excess profits. Section 401 of that Act was the means taken by Congress to integrate naval construction with the general scheme. The phraseology of Section 401 of that Act is clear and definite and is to the effect that for the duration of the excess profits tax, no separate or subsidiary plan for the control of excess profits should be carried out for naval construction.

The foregoing statements as to the meaning and purpose of Section 401 are based upon the House Committee Report made when the Revenue Act was presented to Congress for its consideration. The pertinent parts of the report read as follows:

> "In its report on the revenue bill of 1940, your Committee expressed the desire that the rearmament program should furnish no opportunity for the creation of new war millionaires or the further substantial enrichment of already wealthy persons. *Your committee is still of this opinion but, at the same*

time, deems it advisable to stimulate the cooperation of private enterprise in the defense program by suspending the profit limitations of the Vinson-Trammell Act, applicable to the construction of naval vessels and Army and Navy aircraft. In addition, it is considered desirable to provide special amortization with respect to the facilities necessary in the national defense, in order further to encourage the participation of private enterprise in the rearmament program.

"While these benefits are being accorded to business engaged directly in the defense program, your committee feels that they should be accompanied by a general excess-profits tax rather than one limited to contractors for Army and Navy aircraft and naval vessels or even to munitions manufacturers generally. Accordingly, the tax provided in the bill will apply to corporate profits from all sources. *This is felt desirable since the segregation of profits directly attributable to the expenditures of the Government for the defense program presents insuperable difficulties.*

"For these reasons your committee recommends the incorporation in the same bill of these three interrelated features, each of great importance to the financial aspects of the defense program: the suspension of the profit limitations under the Vinson-Trammell Act, the provision of special amortization for defense facilities, and an excess-profits tax * * *.

"Upon thorough examination, it appeared that the excess-profits tax should apply only to corporations, as individual and partnership incomes are subject to heavy surtaxes upon net income, whether or not left in the business, while, in general, neither corporations nor their stockholders pay surtaxes upon earn-

ings which are not distributed. Moreover, since all of the assets of an individual, whether he be a sole proprietor or a member of a partnership, are at the risk of the business, it is extremely difficult, if not impossible, to determine the capital actually invested.
* * *

"The provisions of the Vinson-Trammell Act, as amended, relating to limitation of profit on contracts for the construction or manufacture of naval vessels and Army and Navy aircraft, *are suspended* as to contracts or subcontracts for such construction or manufacture *which are entered into or completed during the taxable years to which the excess-profits tax will be applicable.*

"Since the proposed excess-profits tax will apply to all corporations, including corporations now subject to the special profit-limiting provisions of the Vinson-Trammell Act, it is felt that such special provisions should not apply while the excess-profits tax is in force. *Uniformity will thereby be achieved in the treatment for tax purposes of all abnormal profits resulting from the national defense program. It is not believed that the limited types of businesses affected by the Vinson-Trammell Act should be treated, during the period in which the excess-profits tax applies, differently from the way in which other businesses engaged in production for the national defense are treated."*

H. R. No. 2894 (August 28, 1940, 76th Congress), Cum. Bull. 1940-2, p. 496.

Congressional debate and reports may be considered in determining the background of legislation, and the history of the times in which the legislation was passed, in order to arrive at the ends intended to be achieved.

U. S. v. Trans-Missouri Freight Association, 166 U. S. 290, 41 L. Ed. 1007;

Standard Oil Co. of New Jersey et al. v. U. S., 211 U. S. 1, 55 L. Ed. 619;

Federal Trade Commission v. Raladam Co., 283 U. S. 643, 75 L. Ed. 1324.

The provisions and meaning of Section 401 of the Revenue Act are clear and definite. The plan or scheme for the regulation of excess profits on military and naval construction of all types which is contained in the Revenue Act of 1940 is likewise clear and definite. Any plan purporting to regulate so-called excess profits upon naval construction which flies in the face of the prohibitions of Section 401 and which does not conform with the method of regulation laid down by Congress must be ineffective and may not be enforced.

> "It is clear that contracts in direct violation of statutes expressly forbidding their execution cannot be enforced. * * * [It is a question of] absolute want of power to do that which is inhibited by statute and if attempted, is in positive terms declared utterly null and void."

Gibbs v. Consolidated Gas Co. of Baltimore, 130 U. S. 396, 32 L. Ed. 979.

> "For there is a limitation upon the above rule to the effect that where the contract is illegal or against public policy the courts will refuse to en-

force it and will leave the parties where it finds them, regardless of the fact that one of them may be retaining benefits received thereunder. (*Visalia Gas etc. Co. v. Sims,* 104 Cal. 326 (43 Am. St. Rep. 105, 37 Pac. 1042.) A contract that is unlawful as being against the express provisions or general policy of any particular statute is void and will not be enforced by the courts. (See note to *In re Assignment Mutual Guaranty Fire Ins. Co.* (107 Iowa 143, 77 N. W. 868), 70 Am. St. Rep. 149, at p. 170, and cases cited thereunder.)"

Pacific Electric Railway Co. v. Commonwealth Bonding & Casualty Ins. Co., 55 Cal. App. 704 (204 Pac. 262).

VIII.

Unrealistic Stress Upon Technicalities Must Be Adopted in Order to Conclude That Subcontract VS-14 Is Not a Subcontract Falling Within the Provisions of Section 401 of the Revenue Act of 1940.

Section V of this brief shows that having regard to the use and operation of vessels constructed under subcontract VS-14, they were naval vessels.

Section VI of this brief shows that having regard to the manner in which the construction of these vessels was undertaken, they were constructed pursuant to agreements between the United States Navy and the Commission and were planned and constructed to fulfill the Navy's requirements.

Section VII of this brief shows that where naval construction was involved, it was the expressed policy of the Congress of the United States that there should be no

other scheme for the control of so-called excess profits than as provided by the Congress in the Revenue Act of 1940.

To avoid these facts and the necessary conclusion therefrom that Special Provision 4 of subcontract VS-14 is a prohibited plan for the collection of so-called excess profits, there seems only one answer: to lay a wholly unnecessary and unrealistic stress upon technicalities of the wording of the contract and the statute.

Permanente has stressed the fact that the prime contract under which subcontract VS-14 was entered into was not originally a contract with the Secretary of the Navy. Admitedly the Prime Contract antedates the arrangements which were made for the construction of these vessels and was made by the Maritime Commission. However, the profit limitation provision of the Vinson-Trammell Act was never considered to depend upon the strict technicality of the contracting authority. The profit limitation provision, self-explanatory as to its purpose, was carried over in subsequent years and subsequent acts and made applicable to military aircraft in the following terms:

> "All the provisions of Section 496 of Title 34 shall be applicable with respect to contracts for aircraft or any portion thereof for the Army to the same extent and in the same manner that such provisions are applicable with respect to contracts for aircraft or any portion thereof for the Navy." (53 Stat. 555; 10 U. S. C. A. 311.)

The Merchant Marine Act of 1936 contains an essentially similar provision, a very obvious adaptation of the provision in the Vinson-Trammell Act (46 U. S. C. A. 1155b). Finally, in connection with the War and Defense Contract Act of June 28, 1940 (54 Stat. 676) it was

provided that "no contract shall be made for the construction or manufacture of any complete naval vessel or any portion thereof" unless the contractor agrees to pay into the Treasury profits in excess of 8 per centum. (50 U. S. C. A. App. 1152.) The profit limitation clause required by Section 496 has been used, therefore, in four different cases. The use in this manner indicates clearly that it is the subject matter of the contract that is determinative and not the contracting authority.

It is apparent from such adaptations that the usefulness and effect of the profit limitation provision was considered to rest upon the type of construction involved and was not considered to rest solely upon the question who was the contracting authority. Thus the applicability of Section 496a should not be determined by asking whether the prime contract was with the Secretary of the Navy, but should be determined by asking whether the vessels involved were naval vessels or were intended to be used as such.

The *Northern Pacific* case, *supra,* in its discussion of the question of title to property, is directly applicable also to this question. Even more in point is the case of *Southern Pacific Co. v. Defense Supplies Corp.,* 64 Fed. Supp. 607, where it was urged that only officers authorized by Congress to purchase for the Army or Navy could make contracts resulting in the classification of the property contracted for as military or naval property. The Court said:

> "It is true, as stated by plaintiff, that pursuant to its constitutional powers to raise and equip armies and navies, Congress has from time to time appropriated monies to acquire properties for the armed forces and has designated the officers authorized to

so act, in the case of the Army, by 10 U. S. C. A., §1191, and in the case of the Navy, by 34 U. S. C. A., §560. It is also true that defendant corporation has no Congressional authority to make purchases for the Army or Navy Departments.

"But it does not follow at all that, within the purview of the Transportation Act of 1940, property purchased and transported by the Defense Supplies Corporation may not be 'military or naval property' of the United States. The words 'military' and 'naval' as used in the Act are descriptive adjectives. In context they may refer to property of the War or Navy Departments but they also properly and logically are descriptive, irrespective of ownership, of the nature of the property itself, with respect not merely to its tangible form and characteristics but as well, as is the case here, to the nature of its contemplated use. Having in mind the history of the 'land grant allowance' legislation, it is clear to me that Congress did not intend to retain for the benefit of the United States reduced rates for the transportation only of property assigned to the War or Navy Departments and fit for immediate use and not for its property undeniably dedicated to military use but not yet assigned to the War Department because not at the moment in the ultimate form usable in actual conflict." (Affirmed *sub nom, Southern Pacific Company v. Reconstruction Finance Corporation* (C. C. A. 9), 161 F. 2d 56 (cited with approval in *Northern Pacific Railway Co. v. U. S., supra*).)

In the *Northern Pacific* case, *supra,* the Supreme Court of the United States specifically approved of this decision.

Furthermore, despite the fact that prime contract shows only the Maritime Commission as the signatory party,

that fact cannot be relied upon to escape the provisions of 496a. In effect, unless the Commission can claim to stand in its own right as a contracting agency with respect to these 22 vessels and make that claim so as to make the vessels Maritime Commission vessels, Section 496a is applicable. The Commission cannot make that claim. There appear to be two different sources of authority granted by Congress under which the Commission undertakes the construction of vessels.

The first of these sources is contained in the Merchant Marine Act of 1936 (46 U. S. C. A. 1101, *et seq.*) and in particular, subchapter 5 thereof, providing for the construction differential subsidy (46 U. S. C. A. 1151-61). A brief reading of the code provisions suffices to show that these vessels were not built and that the prime and subcontracts here involved were not entered into under their authority.

The second source of authority under which the Commission undertakes the construction of vessels is to be found in Public Law 5, the joint resolution of February 6, 1941 (55 Stat. 5, 46 U. S. C. A. 119a), see Appendix "A."

Aside from the question whether the Commission's authority to build these vessels must not have been necessarily derived from that law, the prime contract specifically states in paragraph 1 of its preamble that it was entered into under the authorities of Public Laws 247 and 630 of the 77th Congress. As will be shown in succeeding paragraphs, those two laws directly adopt Public Law 5 and show beyond the shadow of a doubt that the Commission's powers in connection with the vessels con-

templated by prime contract are derived from and delimited by Public Law 5.

Public Law 5 provided in subsection 1 for the creation of an emergency ship construction fund for the United States Maritime Commission, to be available for the construction of cargo vessels of such type, size and speed as the Commission may determine to be useful in time of emergency for carrying on the commerce of the United States. Subsection 2 of that Act (46 U. S. C. A. 1119b) sets forth the several other laws or provisions that should control the acts of the Maritime Commission in carrying out its duties under the first section. Among the provisions in the Merchant Marine Act of 1936, only Section 207 (46 U. S. C. A. 1117) was made applicable, and that section gives the Commission power to enter into contracts in the same manner that a private corporation may contract within the scope of authority conferred by its charter. Section 4 of the same act (46 U. S. C. A. 1125a) *further authorized the Commission to construct and repair and outfit vessels for any other department or agency of the government "to the extent that such other department or agency is authorized by law to do so for its own account."*

Public Law 247 (First Supplemental National Defense Appropriation Act of 1942, 55 Stat. 669), see Appendix "B," one of the authorizing laws referred to in the prime contract, makes an appropriation to the construction fund for the Merchant Marine Act of 1936 and for vessel construction. This Act specifically provides that Sections 2 and 4 of Public Law 5 shall apply to all the activities and functions which the Commission is authorized to perform under this law.

Public Law 630 (the Independent Offices Appropriation Act of 1943, 56 Stat. 392), see Appendix "C," the other of the authorizing laws referred to in the prime contract, makes a further appropriation of money to the construction fund established under the Merchant Marine Act and provides that the construction fund shall be available to carry out the activities and functions which the Commission is authorized to perform under Public Law 247.

Public Law 5 authorizes the *construction of emergency shipping* and also *construction for other agencies or departments of government,* and the terms of that law, through its incorporation in Public Law 247 and 630, indicate directly the authority under which the prime contract was entered into and the scope of the Commissioner's powers in connection with the vessels constructed under the contract.

It is not important, therefore, that the prime contract under which subcontract VS-14 was entered into was made with the Maritime Commission. It is not important that the vessels upon which Birnie worked were originally contemplated as a part of the emergency ship construction program and were originally contemplated to be constructed under the authority of Section 1 of Public Law 5. It is abundantly clear that prior to the time VS-14 was entered into, the Navy had been authorized to procure this type of vessel and had been granted by Congress the funds necessary to procure them. That the Navy, having the authority and having the funds, elected to obtain these vessels through or from or in conjunction with the United States Maritime Commission is shown

by the correspondence between the two agencies and by in particular Addendum 2 to the prime contract wherein Permanente and the Maritime Commission recognized the altered status of these vessels and the additional costs thereby incurred.

Therefore, at a time prior to entering into subcontract VS-14, the vessels involved in that contract and originally planned for the Maritime Commission were segregated for the United States Navy as a part of its authorization of auxiliary vessels to be paid for, so far as necessary, from its funds.

At the time that those facts were determined, and when the Maritime Commission, whether willingly or unwillingly, consented to that segregation, construction thereafter must have been under the authority of Section 4 of Public Law 5, for otherwise the Maritime Commission could not have undertaken this work for the United States Navy.

It is not important to this case to determine whether the course of correspondence and agreement between the Maritime Commission and the Navy Department constituted the Maritime Commission an agent for the Navy Department so that it can be said that with respect to these 22 vessels the contract of Permanente with the Maritime Commission was thereafter the same as a contract made with the duly authorized agent of the Secretary of the Navy. It is submitted that in fact, and as shown by Addendum 2 to prime contract, this represents

the true situation, but in any event since from the time of segregation of these vessels for the United States Navy, construction must have been carried on under Section 4 of Public Law 5, and the Commission is as bound by restrictions of the authority on the Secretary of Navy or upon the Navy Department as would be the Secretary of Navy himself. What the Secretary of Navy could not have done in respect to these vessels, the Commission could not do.

Had the Secretary of the Navy undertaken this program, certainly Section 401 of the Revenue Act of 1940 would have been applicable. Permanente admits as much. The Commission could undertake the program at the Navy's request subject always to the same restrictions. Whether by virtue of the inter-agency correspondence and addendum No. 2 to the prime contract, the Commission became an agent of the United States Navy when it undertook the program, or whether it only became subject to the restrictions, does not matter; in either event it cannot do what the Secretary of the Navy could not do, and he could not evade Section 401 of the Revenue Act of 1940. Had the Secretary of Navy sought to require the insertion of Special Provision No. 4 in VS-14, or had he sought to permit the prime contractor to make such insertion, Section 496a would serve to either prohibit the insertion or to render the insertion *without effect* with respect to these 22 vessels. The Maritime Commission stands in no different position than the Secretary of Navy and Special Provision No. 4 is without effect.

Conclusion.

It is respectfully submitted that this court should upon the record before it reverse the judgment of the District Court and direct that the District Court enter judgment in favor of defendant Birnie for the sum of $78,872.86, with interest. The record before this Court would authorize this reversal since the undisputed evidence and the law pertaining to the issues raised indicate error on the part of the District Court in having given effect to Special Provision No. 4 of VS-14. This for the reason that the undertaking on the part of Birnie to pay to Permanente profit in excess of ten per cent of the total contract price, the same to become the sole property of the Commission, is rendered without effect by virtue of Section 401 of Title IV of the Second Revenue Act of 1940. This accounting for profit should be made direct to the Bureau of Internal Revenue so that Birnie may gain the privilege of applying against this amount such losses as he may have incurred during the appropriate taxable years.

Respectfully submitted,

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Attorneys for Appellant John Urquhart Birnie.

APPENDIX "A."

PUBLIC LAW 5: JOINT RESOLUTION OF FEBRUARY 6, 1941 (55 STATS. 5, 46 U. S. C. A. 1119a, b. 1125a.).

Section 1: "For the purpose of providing as rapidly as possible cargo ships essential to the commerce and defense of the United States there is hereby appropriated to the United States Maritime Commission, out of any money in the Treasury not otherwise appropriated, the sum of $313,500,000, to remain available until expended, which amount shall be additional to the $500,000 allocated from the Emergency Fund for the President in the Act of June 13, 1940, ch. 343, §1, 55 Stat. 377, and $36,000,000 to be allocated during the fiscal year 1942 from funds available for the payment of obligations incurred for the purposes hereof under the contract authorizations under such emergency fund for the President, the total of such sums, aggregating $350,000,000, to be known as the 'Emergency Ship Construction Fund, United States Maritime Commission,' which fund shall be available for the payment of said contract authorizations and for (1) the construction in the United States of oceangoing cargo vessels of such type, size, and speed as the Commission may determine to be useful in time of emergency for carrying on the commerce of the United States and to be capable of the most rapid construction; (2) the production and procurement of parts, equipment, material, and supplies for such ships; (3) the establishment, acquisition, construction, enlargement, or extension of plants or facilities, on land whether owned by the Government or otherwise owned (including the acquisition by purchase or condemnation of real property or any interest therein), to be used for the construction of ships or for the production of parts, equipment, supplies, or material there-

for, and the maintenance, repair, operation (under lease or otherwise), and management of such plants and facilities; and (4) all administrative expenses in connection with the program provided herein including personal services at the seat of government and elsewhere: *Provided,* That the employment of personnel engaged in the maintenance, repair, operation, or management of plants or facilities shall be without regard to the civil service and classification laws: *Provided further,* That no part of this appropriation shall be used to pay the salary or wages of any person who advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United States by force or violence: *Provided further,* That for the purposes hereof an affidavit shall be considered *prima facie* evidence that the person making the affidavit does not advocate, and is not a member of an organization that advocates, the overthrow of the Government of the United States by force or violence: *Provided further,* That any person who advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United States by force or violence and accepts employment the salary or wages for which are paid from this appropriation shall be guilty of a felony and, upon conviction, shall be fined not more than $1,000 or imprisoned for not more than one year, or both: *Provided further,* That the above penalty clause shall be in addition to, and not in substitution for, any other provisions of existing law."

Section 2: "The provisions of section 1117 of this title and the Act of October 10, 1940, ch. 838, 54 Stat. 1092, shall apply to all the activities and functions which the Commission is authorized to perform under section 1119a of this title; and the Commission is authorized to

carry on the objects, activities, and functions provided for in section 1119a of this title, without regard to the provisions of section 733 of Title 33, section 529 of Title 31, and section 5 of Title 41; section 744g of Title 18, relating to the purchase of prison-made goods; sections 270a-270d of Title 40, requiring performance and other bonds on public works; section 303b of Title 40, relating to the lease of Government property, and any provision of law relating to the disposal of surplus Government property."

Section 4: "The Commission is authorized to construct, reconstruct, repair, equip, and outfit, by contract or otherwise, vessels or parts thereof, for any other department or agency of the Government, to the extent that such other department or agency is authorized by law to do so for its own account, and any obligations heretofore or hereafter incurred by the Commission for any of the aforesaid purposes shall not diminish or otherwise affect any contract authorization granted to the Commission: *Provided,* the obligations incurred or the expenditures made are charged against and, to the amount of such obligation or expenditure, diminish the existing appropriation or contract authorization of such department or agency."

APPENDIX "B."

PUBLIC LAW 247: FIRST SUPPLEMENTAL NATIONAL DEFENSE APPROPRIATION (55 STAT. 669 at 681).

"Title III—United States Maritime Commission.

"Construction fund, United States Maritime Commission, Act of June 29, 1936, revolving fund: For an additional amount to increase the construction fund established by the 'Merchant Marine Act, 1936,' and for (1) the construction in the United States of merchant vessels of such type, size, and speed as the United States Maritime Commission (hereafter referred to in this title as the 'Commission') may determine to be useful for carrying on the commerce of the United States and suitable for conversion into naval or military auxiliaries; (2) the production and procurement of parts, equipment, material, and supplies for such vessels; (3) the establishment, acquisition, construction, enlargement, or extension of plants or facilities, on land, whether owned by the Government or otherwise owned (including the acquisition by purchase or condemnation of real property or any interest therein), to be used for the construction of vessels or for the production of parts, equipment, supplies, or material therefor, and the maintenance, repair, operation (under lease or otherwise), and management of such plants and facilities; and (4) the purchase, requisition, charter, operation, repair, reconstruction, and reconditioning of vessels acquired, or the use or possession of which is acquired by the Act of June 6, 1941 (Public Law 101), or otherwise; $698,650.00, of which $2,000,000 shall be available for adminis-

trative expenses of the Commission, including the objects specified under the heading 'United States Maritime Commission' in the Independent Offices Appropriation Act, 1942, of which $2,000,000 not to exceed $40,000 shall be available for the transfer of household goods and effects, as provided by the Act of October 10, 1940 (Public Act Numbered 839), and regulations promulgated thereunder, including such expenses of persons employed by the Commission in furtherance of the program authorized by the Act of February 6, 1941 (Public Law 5), and $150,000 shall be available for the employment on a contract or fee basis of persons, firms, and corporations for the performance of special services, without regard to section 3709 of the Revised Statutes: *Provided,* That said construction fund so supplemented shall be available for the foregoing purposes: *Provided further,* That there may be transferred from this appropriation to the 'Emergency Ship Construction Fund, United States Maritime Commission', created by the said Act of February 6, 1941, such amounts as the Commission may deem necessary for the completion of the program authorized by said Act: *Provided further,* That whenever the President deems it to be in the interest of national defense, he may authorize the Commission to lease vessels constructed or acquired with funds appropriated by this title to the Government of any country whose defense the President deems vital to the defense of the United States, in accordance with the provisions of the Act of March 11, 1941 (Public Law 11): *Provided further,* That in ad-

dition to contract authorizations contained in previous Acts, the Commission is authorized to enter into contracts for the construction of vessels, production and procurement of parts, equipment, material, and supplies for such vessels, and the establishment, acquisition, construction, enlargement, or extension of plants or facilities as provided herein in an amount not to exceed $1,296,650,000 (for which $296,650,000 is included in the amount appropriated herein): *Provided further,* That the provisions of sections 2 and 4, and several proviso clauses contained in section 1 of said Act of February 6, 1941, shall apply to all the activities and functions which the Commission is authorized to perform under this title."

APPENDIX "C."

PUBLIC LAW 630: INDEPENDENT OFFICES APPROPRIATION (56 STAT. 392 at 418).

"United States Maritime Commission

"To increase the construction fund established by the 'Merchant Marine Act, 1936', $980,080,000, of which not to exceed $9,956,734 shall be available for administrative expenses of the United States Maritime Commission, including the following: Personal services in the District of Columbia and elsewhere; travel expenses in accordance with the Standardized Government Travel Regulations and the Act of June 3, 1926, as amended, including not to exceed $2,500 for expenses of attendance, when specifically authorized by the Chairman of the Commission, at meetings concerned with work of the Commission; printing and binding; lawbooks. books of reference, and not to exceed $6,000 for periodicals and newspapers; contract stenographic reporting services; procurement of supplies, equipment, and services, including telephone, telegraph, radio, and teletype services; purchase and exchange (not to exceed $2,500), maintenance, repair, and operation of passenger-carrying automobiles for official use; typewriting and adding machines, and other labor-saving devices, including their repair and exchange; expenses (not exceeding $60,000) for transfer of household goods and effects as provided by the Act of October 10, 1940 (Public, Numbered 839), and regulations promulgated thereunder; necessary expenses (not exceeding $6,000) incident

to the education and training of personnel of the Commission detailed at institutions for scientific education and research as authorized by the Act of August 4, 1939; compensation as authorized by said Act of August 4, 1939, for officers of the Army, Navy, Marine Corps, or Coast Guard, detailed to the Commission; allowances for living quarters, including heat, fuel, and light, as authorized by the Act of June 26, 1930; and including not to exceed $255,000 for the employment, on a contract or fee basis, of persons, firms, or corporations for the performance of special services, including accounting, legal, actuarial, and statistical services, without regard to section 3709 of the Revised Statutes: *Provided,* That the sum of not less than $20,000,000 from the said construction fund shall be available for the construction of towboats and barges adapted for use in the transportation of oil, gasoline, fuels, and other commodities over the inland or coastal waters of the United States: *Provided,* That the said construction fund shall be available for carrying out the activities and functions which the Commission is authorized to perform under title III of the First Supplemental National Defense Appropriation Act, 1942 (Public Law 247); *Provided further,* That the said construction fund shall be available for carrying out the provisions of Executive Order Numbered 9112 of March 26, 1942; *Provided further,* That the amount of contract authorizations contained in the Independent Offices Appropriation Act, 1942, and Acts prior thereto, for carrying out the provisions of the Merchant Marine Act, 1936, as amended, is hereby increased by $90,000,000."